

64 FLRA No. 197

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
MONONGAHELA NATIONAL FOREST
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R4-88
(Union)

0-AR-4477

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DECISION

July 29, 2010

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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jerrold Mehlman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator granted the Union's grievance, which dealt with reimbursement for the cost of protective footwear. The Arbitrator found that the parties' collective bargaining agreement (CBA) mandated such reimbursement, and that employees similarly situated to the grievant should also be reimbursed. Further, the Arbitrator determined that reimbursement should be at the level determined pursuant to procedures in the CBA.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award**A. Background**

The workers involved are non-professional employees whose duties include coordinating with contractors to plan activities such as building roads for timber cutting and logging purposes in a national forest. Award at 1. They wear various types of "personal protective equipment" (PPE) on the job. *Id.* at 2. This PPE includes safety footwear consisting of a steel-toed, high-ankle boot "to protect the employee's ankle and leg from slipping or sliding on the uneven terrain endemic to the forest floor . . . [and] to protect against hazards at construction sites[.]" *Id.*

Under the parties' previous CBA, employees were reimbursed up to \$90 a year for protective footwear purchased for use on the job. *Id.* The CBA relating to the grievance also provides reimbursement for protective footwear that can be classified as PPE, but states no maximum amount of reimbursement. Instead, the CBA calls for the formation of a "Technician Safety Advisory Committee" (TSAC) to study and recommend a maximum reimbursable amount for PPE. *Id.*

In April 2008, the grievant submitted her request to be reimbursed for the cost of her protective footwear, consisting of high ankle steel-toed boots. *Id.* Shortly afterwards, the TSAC submitted its recommendation that employees be reimbursed for protective footwear in a range of \$120 to \$200 a year. *Id.* However, the Agency rejected this recommendation because, in the Agency's view, reimbursement was not "legally required." *Id.*

As a result of its determination, the Agency denied the grievant reimbursement for her protective footwear. She subsequently filed a grievance requesting reimbursement, interest, an apology from the Agency, and that the Agency stop violating the agreement. *Id.* at 3. The Agency denied the grievance on the basis that reimbursement for protective footwear was not legally required. *Id.* at 6. The Agency explained that, because the grievant's boots were of the type she could wear to and from work, the Agency was exempt from any Occupational Safety and Health Administration (OSHA) requirement that the Agency furnish the boots. *Id.* The matter was submitted to arbitration.

B. Arbitrator's Award

At arbitration, the Arbitrator formulated the issues as follows:

1. Whether under the terms of Article 19, Section 6 of the [CBA], [the Agency] is obligated to reimburse the grievant for protective footwear (boots) she purchased.
2. What will be the applicability of this grievance to other employees in the unit?
3. What shall be the remedy should the grievance be sustained?

Id. at 2.

The Arbitrator found that the CBA mandated reimbursement for the cost of the grievant's protective footwear. *Id.* at 5-6. As the Arbitrator interpreted the CBA and applicable OSHA guidance, the Agency was obligated to supply PPE to employees to protect employees from hazardous conditions encountered during the performance of their official duties. *Id.* at 5. The Arbitrator also found that "[t]he grievant's need [for] the boots as a PPE has not been an issue" and "[t]here is no dispute as to the need of such footwear for safety purposes." *Id.* at 6, 2.

The Arbitrator rejected the Agency's assertion that an OSHA regulation exempted it from any obligation to reimburse the grievant. The regulation stated that an agency need not pay for any PPE that is personal in nature and that an employee could wear both on and off the job. *Id.* at 6. Analyzing the regulation, the Arbitrator noted additional language in the regulation providing that the issue of reimbursement for such PPEs "may be left to labor-management negotiations." *Id.* Finding that the Agency had agreed to such reimbursement in the CBA, the Arbitrator concluded that the CBA mandated the reimbursement the grievant sought. *Id.*

Furthermore, the Arbitrator concluded that "the definition of a grievance [in the CBA] allowing an employee to challenge an interpretation of the agreement is broad enough to cover employees similarly situated to grievant who may submit protective footwear purchases for reimbursement." *Id.*

As a remedy, the Arbitrator awarded the grievant and similarly situated employees reimbursement for their PPE footwear purchases. *Id.* at 7. The Arbitrator also determined that, pursuant to the CBA, the recommendation of the TSAC regarding the amount of reimbursement available to the employees should be reviewed and adopted by the parties. *Id.* Finally, the Arbitrator found that the grievant was not entitled to an apology from the Agency or to interest on the cost of her protective boots. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the Arbitrator's award is contrary to law and Agency regulations, that the Arbitrator exceeded his authority, and that the award fails to draw its essence from the CBA.

Regarding its contrary to law and regulation claim, the Agency cites Comptroller General decisions stating that employees are required to present themselves for duty properly attired. Exceptions at 2. The Agency also cites provisions in its Forest Service Manual (FSM) that the Agency contends make clear that "properly attired" "means . . . high-topped, leather, lace-up boots." *Id.* (citing FSM 6700). Finally, taking issue with the Arbitrator's finding that the need for steel-toed boots for safety purposes was undisputed, *see* Award at 2, the Agency argues that the grievant's position does not require her to wear steel-toed boots. Exceptions at 2-3.¹

Regarding its exceeds authority exception, the Agency asserts that the Arbitrator erred when he found that the award covers other similarly situated employees. *Id.* at 5. The Agency contends that, because the grievance does not reference any other employees who had purchased boots, the Arbitrator could not find that these other employees are also covered by the award. *Id.* In addition, the Agency objects to the Arbitrator's finding that the TSAC recommendation on reimbursement limits should be adopted by the parties. *Id.* The Agency argues that the issue of adopting the TSAC recommendation was also not included in the grievance. *Id.* at 5-6.

1. The Agency also argues that the award violates management rights. Exceptions at 5. As discussed below, this claim was not raised in proceedings before the Arbitrator and is therefore not addressed on its merits in this decision.

As to whether the award fails to draw its essence from the CBA, the Agency disputes the Arbitrator's finding that reimbursing employees for the cost of safety footwear is mandated by the contract. *Id.* at 4. The Agency argues that this ignores clear language in the CBA indicating otherwise. *Id.* at 3-5. The Agency also objects that the Arbitrator incorrectly referenced OSHA regulations when he analyzed and applied the CBA. *Id.* at 4.

B. Union's Opposition

The Union argues that the Arbitrator's award is not contrary to law, rule, or regulation. As a threshold matter, the Union argues that the Agency's exceptions do not identify any specific law, rule, or regulation to which the award is allegedly contrary. Opp'n at 4. In addition, the Union cites precedent establishing that CBAs govern the disposition of matters to which both CBAs and agency regulations apply. *Id.* at 5. Because the plain wording of the CBA provides for reimbursement, the Union argues that its members are therefore entitled to such reimbursement. *Id.* Furthermore, the Union contends that the Comptroller General decisions cited by the Agency are not on point. *Id.*

The Union also asserts that the Arbitrator did not exceed his authority. *Id.* at 8. The Union points out that the parties allowed the Arbitrator to frame the issues, and argues that the Arbitrator resolved only those issues in his award. *Id.* at 8, 9. In particular, the Union claims that, consistent with the issues the Arbitrator framed, the Arbitrator properly applied the remedy to all bargaining unit employees. *Id.* at 9. Similarly, the Union contends that, because the parties authorized the Arbitrator to decide the appropriate remedy, the Arbitrator did not exceed his authority when he ordered the Agency to reimburse employees in accordance with recommendations of the TSAC, as reviewed and adopted by the parties. *Id.* at 10

Finally, the Union argues that the Arbitrator's award does not fail to draw its essence from the CBA. *Id.* at 6. Citing Authority case law, the Union asserts that the Agency's belief that the Arbitrator misinterpreted the CBA is not enough to constitute an essence exception because the parties bargained for the Arbitrator to interpret the CBA. *Id.* Specifically, in the Union's view, the Arbitrator properly found that the CBA requires reimbursement for safety footwear as PPE. *Id.* In addition, the Union points out that the CBA expressly provides that reimbursement for PPE "will be provided . . . in

accordance with guidelines recommended by the [TSAC]." *Id.* at 7.

IV. Analysis and Conclusions

A. The award is not contrary to law, rule, or regulation.

Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation. For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Protection & Quarantine*, 51 FLRA 1210, 1216 (1996). However, when both a collective bargaining agreement and an agency-specific (as opposed to government-wide) rule or regulation apply to a matter, the negotiated agreement governs the matter's disposition. *U.S. Dep't of the Army, Ft. Campbell Dist., Third Region, Ft. Campbell, Ky.*, 37 FLRA 186, 195 (1990) (*Dep't of the Army*) ("[a]gency rules and regulations may only govern the disposition of matters to which they apply . . . when the rules and regulations do not conflict with provisions of an applicable collective bargaining agreement.").

When a party's exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by an exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency claims that the Arbitrator's award is contrary law, rule, or regulation on two bases. First, the Agency argues that the award is inconsistent with two Comptroller General decisions that discuss the requirement that employees present themselves for work properly attired. Exceptions at 2. Second, the Agency relies on its Forest Service Manual's statement that, for fieldwork, "appropriate dress . . . means . . . high-topped, leather, lace-up boots." *Id.* In the Agency's view, these authorities contradict the Arbitrator's finding that "[t]here is no dispute as to the need [for] [steel-toed] footwear for safety purposes." *Id.* (quoting Award at 2). The Agency's claims do not have merit.

The award is not contrary to either Comptroller General decision cited by the Agency. Both decisions are clearly inapplicable. One of the cited decisions, published in 1955, finds that the Postal Service may not provide mechanics in its employ with coveralls under the specific provisions of the Post Office's then-current appropriations statute. *See* B-123223 *2 (June 22, 1955) (citing § 13 of the Act of August 2, 1946, 60 Stat. 809, 5 U.S.C. 118G). The Comptroller General's conclusion, that "in the absence of specific statutory authority, general Post Office appropriations for supplies and equipment are not available" to purchase coveralls, resolves the issue of the Post Office's budget authority under the particular statutory framework that the Comptroller General applied. The second Comptroller General decision cited by the Agency, *Matter of: Purchase of Down-Filled Parkas*, 63 Comp. Gen. 245 (1984), has a similarly limited focus.

Neither decision applies in this case. In contrast to the issues resolved by the Comptroller General in the cited cases, there is no question in the instant case about the Agency's budgetary authority to pay for PPE that meets the criteria in the CBA. Furthermore, neither Comptroller General decision has any bearing whatsoever on the Arbitrator's finding challenged by the Agency, that "[t]here is no dispute as to the need [for] [steel-toed] footwear for safety purposes." Award at 2.² Accordingly, the Comptroller General decisions on which the Agency relies do not provide a basis for concluding that the award is contrary to law.³

2. Indeed, *Matter of Down-Filled Parkas* is marginally supportive of the Arbitrator's determination in the instant case. In *Matter of Down-Filled Parkas*, the Comptroller General held that the Department of the Interior could use appropriated funds to purchase down-filled parkas for employees working in cold climates. The Comptroller General reached this conclusion in part because the parkas qualified as PPE under OSHA and OSHA implementing regulations. Under the OSHA regulations cited by the Comptroller General, qualifying PPE was PPE "necessary because 'hazards of processes or environment' could cause injury or physical impairment." *Id.* (quoting 29 C.F.R. §1910.132(a)). The Arbitrator's decision in the instant case reaches an analogous conclusion, approving reimbursement for PPE required for safety reasons.

3. We note that, in any event, decisions of the Comptroller General are not binding on the Authority. "Although a Comptroller General opinion serves as an expert opinion that should be prudently considered, a prior assessment of the Comptroller General is not one to which deference must be given." *AFGE, Local 1458*, 63 FLRA 469, 471 (2009) (citations omitted).

The award is also not contrary to the rules set forth in the Forest Service Manual. This publication provides rules specific to the Forest Service. As stated above, it is well established that when a CBA and an agency-wide rule or regulation both apply to a matter, the CBA governs the matter's disposition. *Dep't of the Army*, 37 FLRA at 194-95. Here, the CBA, as interpreted and applied by the Arbitrator, directs the Agency to reimburse bargaining unit members for the cost of their steel-toed boots up to the maximum recommended by the TSAC, as reviewed and adopted by the parties. In these circumstances, the CBA, not the Forest Service Manual, governs. Consequently, the Forest Service Manual also does not provide a basis for granting the Agency's contrary to law exception.⁴

For these reasons, the Agency's contrary to law exception is denied.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The Agency claims that the Arbitrator exceeded his authority for two reasons. First, the Agency argues that the Arbitrator exceeded his authority when he determined that all employees similarly situated to the grievant should also be reimbursed for the cost of their protective footwear. Exceptions at 5. In support, the Agency asserts that there was no mention in the grievance that any other employees were affected. *Id.*

The Agency's exception is not supported by Authority case law. Under Authority precedent, in the absence of a stipulation by the parties, arbitrators are accorded substantial deference in the formulation of issues to be resolved in an arbitration proceeding.

4. The Agency also argues that the Arbitrator infringed its management rights when he required the parties to review and adopt the TSAC's recommendation. Exceptions at 5. We construe this as a contrary to law exception. However, the Agency does not specify which right it believes was infringed. Furthermore, there is no evidence in the record indicating that the Agency raised this issue in the proceedings before the Arbitrator. Therefore, under § 2429.5 of the Authority's Regulations, the Authority will not consider this exception.

See, e.g., AFGE, Local 1637, 49 FLRA 125, 130 (1994). Accordingly, it is not determinative that the grievance did not specifically include the issue of relief for other unit employees.⁵ Furthermore, there is no evidence that the parties stipulated the issues in this case.

As relevant here, the Arbitrator stated the issue as: “What will be the applicability of this grievance to other employees in the unit?” Award at 2. The Arbitrator’s award concerning reimbursement for employees similarly situated to the grievant is responsive to the issue he formulated. Consequently, the Agency has not demonstrated that the Arbitrator resolved an issue not submitted to arbitration. *See AFGE, Local 1637*, 49 FLRA at 130-31 (upholding an award on the basis that it was responsive to the issue formulated by the arbitrator). Accordingly, this exceeds authority exception is denied.

A similar disposition is appropriate for the Agency’s second exceeds authority exception, concerning the Arbitrator’s reference in his remedy to the TSAC’s recommendation on reimbursement levels. Exceptions at 5-6. Once again, the Agency bases its exception on the argument that the matter resolved by the Arbitrator was not part of the grievance. *Id.*

As discussed previously, it is the issues framed by the Arbitrator, not the grievance’s content, that is determinative in analyzing whether an arbitrator exceeded his authority. The part of the Arbitrator’s issue statement concerning remedy encompasses his ruling concerning the TSAC’s recommendation. In this connection, the issues framed by the Arbitrator included: “What shall be the remedy should the grievance be sustained.” Award at 2.

Resolving the remedy issue, the Arbitrator ruled that the reimbursement for PPE footwear purchases due the grievant and other employees should be determined pursuant to the agreement; that is, at the level recommended by the TSAC, as reviewed and adopted by the parties. The TSAC’s function under the CBA includes the responsibility to “determine” and “recommend” a minimum and maximum

5. We note, nevertheless, that the grievance the Union presented to the Agency requested, as part of the remedy, “for management to stop violating the [CBA].” Award at 3. This language effectively put the Agency on notice that the grievance was seeking a remedy that went beyond the grievant’s own circumstances and that would be prospective. The Arbitrator’s framing of the issue, and the remedy that he directed, were consistent with this aspect of the grievance.

reimbursement amount for PPE expenditures. *See id.* at 4. In relying on the TSAC recommendation process to determine reimbursement levels, the award is responsive to the remedy issue. Accordingly, for the reasons discussed above, the Authority denies this exceeds authority exception as well.

Therefore, the Agency’s exceeds authority exceptions are both denied.

- C. The award does not fail to draw its essence from the CBA.

In reviewing an arbitrator’s interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990). This standard and the private sector cases from which it is derived make it clear that an arbitrator’s award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement. *See id.* at 575-76. The courts defer to the arbitrator’s interpretation of the collective bargaining agreement “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” *Id.* at 576.

The Agency claims that the Arbitrator erroneously concluded that reimbursement is mandated by the contract and that this ignores clear language in the CBA indicating otherwise. Exceptions at 3-5. Specifically, the Agency argues that the CBA requires that, to be reimbursable, a PPE must be specified in an employee’s Job Hazard Analysis (JHA). *Id.* at 4. The Agency contends that the Arbitrator ignored this requirement.

The Agency has failed to demonstrate that the award fails to draw its essence from the parties’ agreement. Article 19, § 6 provides, in pertinent part: “Personal Protective Equipment (PPE) as required by

applicable OSHA standards to protect employees from hazardous conditions encountered during the performance of their official duties, will be provided to employees required to wear specific PPE as determined by a JHA.” Award at 3-4.

The Arbitrator’s conclusion that “reimbursement is mandated by the contract” rested on a number of bases. *Id.* at 6. Significantly, the Arbitrator found that “[t]he grievant’s need [for] the boots as a PPE has not been an issue” and “[t]here is no dispute as to the need for such footwear for safety purposes.” *Id.* at 6, 2. In addition, the Arbitrator noted that pertinent OSHA regulations did not prohibit an employer from agreeing in collective bargaining to reimburse employees for PPE. *Id.* at 6.

The Agency fails to explain why it was irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to find that Article 19, § 6 does not apply where it was undisputed that the grievant needed the protective footwear as PPE for safety purposes. Although such a need is ordinarily documented in a JHA, in this case the Arbitrator found that the existence of such a need was not an issue because the need was undisputed. Moreover, as the Union notes, *see* Opp’n at 8, the most recent JHA on file for the grievant’s position requires “work boots with ankle, shank & toe protection.” Exceptions, Ex. 8. Nothing in the Agency’s exceptions or otherwise provides any basis for finding that the Arbitrator’s construction and application of the CBA did not rest, in part, on this record evidence. Accordingly, this essence exception is denied.

The Agency also argues that the award fails to draw its essence from the CBA because the Arbitrator discussed and relied on OSHA regulations. Exceptions at 4. The Agency’s objection does not establish that the award is deficient on essence grounds. The Arbitrator cites OSHA regulations twice in discussing his award. The Arbitrator’s first reference cites OSHA regulations to explain the meaning of the term PPE. *See* Award at 5. The Arbitrator’s second reference responded to the Agency’s argument that it was exempt under OSHA regulations from being required to reimburse the grievant for her protective footwear. *See id.* at 6. In response, the Arbitrator merely notes that, under those regulations, the issue of employer PPE reimbursement “may be left to labor-management negotiations.” *Id.* at 6. Neither of these references demonstrates that the award, which was based on the Arbitrator’s consideration of the CBA and his factual findings, is not entitled to the deference due an

arbitrator on essence issues. Accordingly, we also deny this essence exception.

Therefore, both of the Agency’s essence exceptions are denied.

V. Decision

The Agency’s exceptions are denied.